LANDMARK PROPERTY SDN BHD v. KETUA PEGAWAI EKSEKUTIF/KETUA PENGARAH HASIL DALAM NEGERI & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM JC
[JUDICIAL REVIEW NO: BKI-25JR-1-11-2020]
9 JULY 2021

ADMINISTRATIVE LAW: *Judicial review – Application for – Certiorari, declaratory orders and reliefs – Application for judicial review against decision of Inland Revenue Board ('IRB') – Government of Malaysia provided facilitation fund to taxpayer for development of land – IRB stated that facilitation fund exempt from income tax and any expenditure incurred out of facilitation fund would not be eligible for deduction – IRB issued notices of assessment to taxpayer – Whether impugned assessments ultra vires Income Tax (Exemption) (No. 22) 2006, s. 127(3)(b) of Income Tax Act 1967 and arts. 8 and/or 96 of Federal Constitution – Whether impugned assessments illegal, in excess of jurisdiction and/or irrational – Whether null and void – Rules of Court 2012, O. 53 r. 4*

REVENUE LAW: *Income tax – Assessment – Notices of assessment – Government of Malaysia provided facilitation fund to taxpayer for development of land – Inland Revenue Board ('IRB') stated that facilitation fund exempt from income tax and any expenditure incurred out of facilitation fund would not be eligible for deduction – IRB issued notices of assessment to taxpayer – Whether impugned assessments ultra vires Income Tax (Exemption) (No. 22) 2006, s. 127(3)(b) of Income Tax Act 1967 and arts. 8 and/or 96 of Federal Constitution – Whether impugned assessments illegal, in excess of jurisdiction and/or irrational – Whether null and void*

This was an application under O. 53 r. 4 of the Rules of Court 2012 ('ROC') by the applicant ('taxpayer') for judicial review, seeking (i) declarations that the notices of assessment for the years of assessment 2016, 2017 and 2018 ('impugned assessments'), issued by the respondents, were *ultra vires* the Income Tax (Exemption) (No. 22) 2006 ('Exemption Order'), s. 127(3)(b) of the Income Tax Act 1967 ('Act') and arts. 8 and/or 96 of the Federal Constitution ('FC'); (ii) an order of *certiorari* quashing the impugned assessments on the grounds that the impugned assessments were illegal, in excess of jurisdiction and/or irrational and consequently, null and void; and (iii) an order to prohibit the respondents from taking any steps to enforce and/or execute the impugned assessments pursuant to the Act and/or otherwise in any manner whatsoever. The taxpayer was appointed by Lembaga Pembangunan Perumahan dan Bandar to develop a piece of land for the sale of affordable homes. The Government of Malaysia provided financial assistance in the amount of RM104,202,080 ('facilitation fund') for this project. The second respondent's Tax Policy Department issued a letter

A ('second respondent's letter') which stated that (i) the facilitation fund was exempt from income tax pursuant to para. 2 of the Exemption Order; and (ii) any expenditures incurred out of the facilitation fund would not be eligible for deduction, pursuant to paras. 3(1), 3(2) and 4 of the Exemption Order. The taxpayer's tax agents ('tax consultants') wrote to the second B respondent to confirm that paras. 3(1), 3(2) and 4 of the Exemption Order did not apply to the taxpayer but there was no response. Subsequently, the second respondent commenced a tax investigation ('tax investigation') on the taxpayer, its related companies and their common directors and notices pursuant to s. 81 of the Act was each issued to the taxpayer and KTI Sdn C Bhd, a related party to the taxpayer as they both had common directors and shareholders. A notice pursuant to ss. 78 and 79 were also issued to the director of KTI and the taxpayer. A further notice pursuant to s. 81 of the Act was issued to the taxpayer for documentation pertaining to the facilitation fund. A global settlement was entered into pursuant to s. 96A(1) of the Act ('global settlement'). The taxpayer accepted the global settlement D and later forwarded to the second respondent cheques in the amount of RM757,718.60 and RM747,837.50, towards the full settlement of the back duty taxes. According to the taxpayer, contrary to and in breach of the global settlement, the second respondent issued a notice pursuant to s. 81 of the Act to the taxpayer, requesting further information and documents on matters E covered in the tax investigation. The impugned assessments were raised, disallowing a portion of expenditures on the project costs claimed by the taxpayer for years of assessment 2016 to 2018 ('expenditures') based on the unsubstantiated position of the revenue that the expenditures were incurred out of the facilitation fund or were reimbursed from the facilitation fund, F thereby purportedly falling within the ambit of para. 3 of the Exemption Order. Hence, this judicial review application. The respondents submitted that this application for judicial review should be dismissed with costs on the following grounds: (i) the taxpayer had not discharged the burden to establish 'very exceptional circumstances'; (ii) the taxpayer failed to establish G illegality, irrationality/unreasonableness and legitimate expectation; (iii) the questions and merits of this case were substantial questions of fact which needed to be determined before the SCIT; (iv) the judicial review application was an abuse of the process of court; and (v) the taxpayer must exhaust the domestic remedy, especially since they had filed Form Q.

H **Held (allowing application):**

(1) The respondents failed to take into account some relevant considerations and have taken into account some irrelevant considerations. The respondents also failed to consider or take into account the fact that the taxpayer had acquired vested rights for tax exemption under the I Exemption Order. There was no evidence to show that the tax exemption acquired by the taxpayer had been expressly revoked. In the

premises, the respondents had committed an error of law and the impugned assessments were tainted with illegality and made without jurisdiction. The decision of the respondents was amenable to judicial review. Further, the impugned assessments were (i) *ultra vires* the Exemption Order, s. 127(3)(b) of the Act and art. 96 of the FC; (ii) made in excess of power and without jurisdiction; and (iii) illegal and null and void. (para 25)

(2) The second respondent's letter recognised that the facilitation fund was tax exempt. Furthermore, the taxpayer's tax consultants had written to the second respondent to confirm that paras. 3(1), 3(2) and 4 of the Exemption Order did not apply, to which the second respondent did not respond. Therefore, the taxpayer had a legitimate expectation and was entitled to be treated fairly and be informed or given notice or a prompt reply to the taxpayer's tax consultant's letter before the tax exemption or the deductibility of the expenditures was disallowed. To hold otherwise tantamount to a breach of the principles of natural justice and in breach of the legitimate expectation of the taxpayer to be treated fairly. The respondents should not be allowed to contend that paras. 3(1), 3(2) and 4 of the Exemption Order did not apply to the entire facilitation fund and to disallow the deduction of the expenditures. This would be akin to retrospectively revoking or withdrawing the tax exemption for the facilitation fund. The respondents should not be allowed to approbate and reprobate as it was unconscionable and plainly unfair. (para 29)

(3) The burden was on the respondents to prove, on a balance of probabilities, that the entirety of the facilitation fund of RM104.2 million was used to fund the expenditures. In the absence of cogent evidence to show that anything more than RM13 million was used to fund the expenditures, the impugned assessments and the impugned penalties were so unreasonable and irrational that no reasonable person could have come to make the impugned assessments. (para 34)

(4) As the second respondent had acted in excess of power and in breach of the rules of natural justice, there were exceptional circumstances in this case that allowed the statutory appeal procedure to be by-passed by way of a judicial review. The respondents had committed an error of law and/or had misconstrued and/or misapplied paras. 3(1), 3(2) and 4 of the Exemption Order of the Act. The impugned decision of the respondents was tainted with illegality. The second respondent was ordered to adjust the impugned assessment to reflect only the expenditures incurred out of the RM13 million and to remove the impugned penalties. (paras 37 & 39)

Case(s) referred to:

Darahman Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah [1967] 1 LNS 41 HC ***(refd)***

Everise Sprint (M) Sdn Bhd v. Minister of Finance, Malaysia & Anor [2015] 7 CLJ 309 CA ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

JK Cotton Spinning and Weaving Mills Ltd v. Union of India AIR 1988 SC 191 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Latex Manufacturing Sdn Bhd [2016] 9 CLJ 86 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar [2006] 5 CLJ 217 HC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 CA ***(refd)***

Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan [2020] 10 CLJ 732 FC ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals [2017] 9 CLJ 595 FC ***(refd)***

R v. Inland Revenue Commisioners ex parte Unilever PK [1996] STC 681 ***(refd)***

R (on the application of Aozora GMAC Investment Ltd) v. Revenue and Customs Commissioners [2020] 1 All ER 803 ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC ***(refd)***

Society of La Salle Brothers v. Ketua Pengarah Hasil Dalam Negeri [2017] 8 CLJ 298 CA ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd [2007] 6 CLJ 570 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 8(1), 96

Income Tax Act 1967, ss. 33(1), 78, 79, 81, 96A(1), 127(3)(b)

Income Tax (Exemption) (No. 22) Order 2006, paras. 2, 3(1), (2), 4

Rules of Court 2012, O. 53 r. 4

For the applicant - Saiful Azian Mokhtar; M/s Jayasuriya Kah & Co

For the respondents - Arsyad Hasanuddin & Mohammad Danial Ahmad; Revenue Counsel Mohd Hafizi Abdul Halim; SFC

Reported by Lina E

JUDGMENT

Leonard David Shim JC:

[1] This is an application under O. 53 r. 4 ROC 2012 by the applicant (the taxpayer) for judicial review. The order and reliefs sought are, *inter alia*, as follows:

(a)(i) a declaration that (1) the notice of assessment (Form J) dated 28 October 2020 for the year of assessment 2016; (2) the notice of assessment (Form J) dated 28 October 2020 for the year of assessment 2017; and (3) the notice of additional assessment (Form JA) dated 28 October 2020 for the year of assessment 2018, (collectively), "the impugned assessments"), are *ultra vires* the Income Tax (Exemption) (No. 22) Order 2006 ("the Exemption Order"), s. 127(3)(b) of the Income Tax Act 1967 ("the Act") and accordingly null and void in law;

(ii) consequently, a declaration that the impugned assessments are *ultra vires* arts. 8 and/or 96 of the Federal Constitution and accordingly null and void;

(iii) an order of *certiorari* quashing the impugned assessments on the grounds that the impugned assessments are illegal, in excess of jurisdiction and/or irrational and consequently, null and void; and

(iv) an order to prohibit the respondents from taking any steps to enforce and/or execute the impugned assessments pursuant to the Act and/or otherwise in any manner howsoever;

(b) an order that the impugned assessments and any enforcement and/or execution proceedings arising therefrom pursuant to the Act and/or otherwise in any manner howsoever, be stayed until the final disposal of the applicant's substantive judicial review application ("the stay").

(c) costs of this application and all costs arising from this application are to be costs in the cause of the judicial review application; and

(d) such further declarations, reliefs or orders that this Honourable Court deems fit, proper or just.

[2] The grounds of this application are:

(i) The impugned assessments are illegal as the impugned assessments are:

(a) *ultra vires* the Exemption Order and therefore, null and void;

(b) *ultra vires* s. 127(3)(b) of the Act and therefore, null and void;

(c) *ultra vires* art. 96 of the Federal Constitution and therefore, null and void;

(d) consequently, illegal and therefore, null and void; and

(e) further and consequently, made in excess of authority and jurisdiction.

(ii) The impugned assessments are in breach of the applicant's legitimate expectations ie, (1) that the facilitation fund extended by the Government of Malaysia ("the facilitation fund") was exempt from income tax; and (2) that the deductibility of the expenditures on project cost claimed by the applicant for YA 2016 to YA 2018 ("the expenditures") was lawful and valid, which the applicant had, at all material times, acted and relied upon. The raising of the impugned assessments amounts to an abuse of power and a retrospective deprivation of the applicant's acquired and vested rights.

(iii) The impugned assessments are egregious and oppressive in that no reasonable person could have come to make the impugned assessments, as the respondents had, in raising the impugned assessment, failed to take into account relevant considerations ie, (1) that the facilitation fund is exempt from income tax pursuant to the Exemption Order; and (2) the applicant, at all material times, acted in good faith, gave full co-operation, made full and frank disclosure and obtained professional advice in managing its finance and tax affairs.

(iv) There are special circumstances that warrant a stay and it is necessary to preserve the *status quo* by suspending the impugned assessment as the applicant would suffer irreparable harm if a stay of the enforcement and/or execution of the impugned assessments is not granted. To make the payment of the impugned assessments of RM14.7M would abruptly halt the business operations of the applicant indefinitely, and cause loss of jobs of the applicant's employees, which make up a headcount of 52 people, which would consequently, be catastrophic to the employees and their families, during this unprecedented Covid-19 pandemic.

(v) Accordingly, the enforcement and/or execution of the impugned assessments has to be stayed to preserve the integrity of the substantive judicial review application, and to prevent the substantive judicial review application, if successful, from being rendered nugatory.

[3] The central issue for determination by this court is whether the impugned assessments are tainted with illegality and irrationality and constitute a breach of legitimate expectation. Consequently, whether the impugned assessments amount to an excess or abuse of the Revenue's power and constitute a breach of the rules of natural justice.

[4] At this juncture, it is appropriate to refer to the constitutional right afforded to the citizen under art. 96 of Federal Constitution from the levy of tax by the Government. In *Ketua Pengarah Hasil Dalam Negeri v. Malaysian Bar* [2006] 5 CLJ 217, the High Court held:

> [3] Section 80(13) of the LPA stipulates that the Malaysian Bar be exempted from tax on the compensation fund. The said provision is constituted under **art. 96 of the Federal Constitution which provides "No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.**" The LPA is a specific legislation whilst the ITA is a general legislation. Where there is a conflict between the LPA and ITA provisions, the LPA prevails.
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> (emphasis added)

[5] In *Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals* [2017] 9 CLJ 595; [2017] 2 MLJ 421, the Federal Court held:

> [116] *In art. 96 of the Federal Constitution is engraved the profound words that no tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.* It is also trite that Parliament may delegate some of the powers to a Minister or any administrative body; and such delegation must be confined to the express authority delegated to it.
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> [117] With such terse words, it is therefore the duty of the court to carefully scrutinise the extent of the delegation (in this case the respondent), particularly in cases which involve a right to impose any financial burden on a person or class of persons. *Even though the appellants here have not been burdened by additional taxes, we hold the view that by depriving them of the exemption the appellants have been financially burdened in another way.* McRuer CJ in *Gruen Watch Company of Canada Limited v. The Attorney General of Canada* [1950] OR 429 had occasion to state in the following manner:
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> > It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinised than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

[6] The main focus of the judicial review application, is on the Exemption Order, which in so far as it is relevant, reads as follows:

> **1. Citation and commencement**
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> (1) This order may be cited as the Income Tax (Exemption) (No. 22) Order 2006.
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> (2) This Order shall have effect from the year of assessment 2006.

2. Exemption

(1) The Minister exempts:

(a) any person from the payment of income tax in respect of income relating to the allocations given by the Federal Government or the State Government in the form of a grant or a subsidy; and

(b) a statutory authority from the payment of income tax in respect of income derived from:

(i) the income received in respect of an amount chargeable and collectible from any person in accordance with the provisions of the Act regulating the statutory authority; or

(ii) any donation or contribution received.

(2) Nothing in subparagraph (1) shall absolve or be deemed to have absolved the person or the statutory authority from complying with any requirement to submit any return or statement of accounts or to furnish any other information under the provisions of the Act.

3. Special treatment on deductions and allowances

(1) Any deduction or allowances to be made or would have been made under the Act or the Promotion of Investments Act 1986 [Act 327] in a basis period for a year of assessment in respect of an expenditure incurred out of the income referred to in subparagraph 2(1) shall be disregarded for that year of assessment and subsequent years of assessment.

(2) Where the expenditure incurred in a basis period for a year of assessment is reimbursed, in full or in part, by the income referred to in subparagraph 2(1), any deductions or allowances to be made or would have been made under the Act or the Promotion of Investments Act 1986 in relation to that expenditure shall be disregarded for that year of assessment and subsequent years of assessment.

4. Maintaining separate record

In ascertaining the deductions or allowances in paragraph 3, the person shall maintain a separate record for the income referred to in subparagraph 2(1).

[7] The following pertinent observations are to be made about the Exemption Order:

(i) To begin with, the exemption from income tax ("the exemption") is provided for in para. 2 of the Exemption Order.

(ii) Paragraph 3 of the Exemption Order prescribes a special treatment in regard to the deductions and allowances in respect of expenditures incurred or reimbursed out of the income exempted under para. 2 of the Exemption Order ie, that such deductions and allowances shall be disregarded for that year of assessment.

(iii) Paragraph 4 of the Exemption Order, which is corollary to para. 3, provides that in ascertaining the deductions or allowances in respect of expenditures incurred out of the exempted income, which are to be disregarded, a separate record must be maintained for the expenditures.

Background Facts

Development Agreement

[8] By way of a development agreement dated 20 May 2011 ("the development agreement") between Lembaga Pembangunan Perumahan dan Bandar and the taxpayer, the taxpayer was appointed to develop a piece of land held under No. Hak milik Country Lease 025341940, in the locality of Kinarut South, District of Papar, in the State of Sabah measuring approximately 19.52 acres under the Perumahan Penjawat Awam 1 Malaysia (now known as Perumahan Penjawat Awam Malaysia) programme ("PPA1M"), for the sale of affordable homes to civil servants ("the project").

Facilitation Fund

[9] By way of a letter dated 19 January 2016, the Government of Malaysia agreed in principle, to provide financial assistance to the taxpayer, in carrying out the project, for an amount not exceeding RM104,202,080.

[10] By way of a facilitation fund agreement dated 28 July 2016 ("the funding agreement") between the Government of Malaysia, Bank Pembangunan Malaysia Berhad and the taxpayer, the Government of Malaysia concretised its commitment to provide financial assistance in the amount of RM104,202,080 ("the facilitation fund") to the taxpayer. The disbursements of the facilitation fund were to be made progressively based on the percentage of completion of the project, as follows:

(i) 25% upon reaching 25% of work done;

(ii) 25% upon reaching 50% of work done;

(iii) 25% upon reaching 75% of work done;

(iv) 20% upon reaching 100% of work done and obtaining occupational certificate; and

(v) 5% upon end of defects liability period.

[11] By way of the letter dated 11 April 2017 issued by the second respondent's Tax Policy Department ("the second respondent's 11 April 2017 letter"), the second respondent admitted that the facilitation fund is exempt from income tax pursuant to para. 2 of the Exemption Order. The second respondent added that any expenditure incurred out of the facilitation fund, would not be eligible for deduction pursuant to paras. 3(1), 3(2) and 4 of the Exemption Order.

(i) Further thereto, the taxpayer, *via* its tax agents, Moore Advent Tax Consultants Sdn Bhd (formerly known as Advent MS Tax Consultants Sdn Bhd) ("the tax consultants"), wrote to the second respondent on 19 April 2017 to confirm that paras. 3(1), 3(2) and 4 of the Exemption Order do not apply to the taxpayer, in this case.

(ii) There was no response to the tax consultants' 19 April 2017 letter.

[12] The facts above, are undisputed by the Revenue (respondents).

[13] Subsequently, the second respondent commenced a tax investigation ("the tax investigation") on the applicant (taxpayer), its related companies and their common directors:

(i) In September 2017, (1) a notice pursuant to s. 81 of the Act was issued to the taxpayer; (2) a notice pursuant to s. 81 of the Act was issued to KTI Sdn Bhd (a related party to the taxpayer, as they both have common directors and shareholders); and (3) notices pursuant to ss. 78 and 79 of the Act were issued to one Dr. Loke Theen Fatt, a director of KTI and the taxpayer, all of which were dated 14 September 2017.

(ii) Subsequently, a further notice pursuant to s. 81 of the Act dated 30 January 2018, was issued to the taxpayer, for documentation pertaining to the facilitation fund.

(iii) Three meetings were held in the course of the tax investigation, on 1 February 2018, 2 March 2018 and 17 May 2018 respectively, attended by officers of the second respondent and the tax consultants. During these meetings, the officers of the second respondent and the tax consultants addressed the second respondent's queries on the taxpayer, KTI Sdn Bhd, Dataran Jayamakmur Sdn Bhd and Dr. Loke Theen Fatt. In so far as the taxpayer was concerned, the sole issue raised by the second respondent was about the facilitation fund.

[14] Pursuant to the meeting on 17 May 2018, a global settlement was entered into (as confirmed by the tax consultants' email on 18 May 2018 to the second respondent), with two agreements prepared by the second respondent ie, (i) an agreement pursuant to s. 96A(1) of the Act in respect of KTI Sdn Bhd; and (ii) an agreement pursuant to s. 96A(1) of the Act in respect of Dataran Jayamakmur Sdn Bhd (collectively, "the global settlement").

[15] On 18 May 2018, the taxpayer accepted the global settlement, and returned the same, duly signed by the taxpayer's directors, through the tax consultants to the second respondent. The applicant contends that this constituted a binding and concluded contract between the taxpayer, KTI Sdn Bhd, Dataran Jayamakmur Sdn Bhd and Dr Loke Theen Fatt on the one

hand, and the second respondent on the other hand, the terms of which were that the total payment of the RM1,505,556.10 was to constitute full and final settlement of tax which was not charged or undercharged.

[16] The taxpayer on 18 May 2018, also forwarded to the second respondent, consideration in the form of (i) seven post-dated cheques in the amount of RM757,718.60 towards full settlement of the back duty tax for KTI Sdn Bhd; and (ii) seven post-dated cheques in the amount of RM747,837.50 towards full settlement of the back duty tax for Dataran Jayamakmur Sdn Bhd.

[17] However, the applicant contends that contrary to and in breach of the global settlement, on 13 March 2020, the second respondent issued a notice pursuant to s. 81 of the Act ("the notice dated 13 March 2020") to the taxpayer requesting further information and documents on matters covered in the tax investigation. This led to an exchange of correspondence between the tax consultants and the second respondent over the next seven months, with the second respondent requesting additional information and documents, over and above those requested under the notice dated 13 March 2020, and the tax consultants furnishing the same to the second respondent.

[18] On 28 October 2020, the impugned assessments were raised, disallowing a portion of expenditures on the project cost claimed by the taxpayer for YA2016 to YA2018 ("the expenditures"), based on the unsubstantiated position of the Revenue, that the expenditures were incurred out of the facilitation fund or were to be reimbursed from the facilitation fund, thereby purportedly falling within the ambit of para. 3 of the Exemption Order. The breakdown of the expenditures are as follows:

(i) YA2016 – RM13,812,943

(ii) YA2017 – RM21,704,785

(iii) YA2018 – RM20,707,816

[19] The judicial review application herein is premised on three grounds, illegality, breach of legitimate expectation and irrationality.

[20] The respondents submitted that this application for judicial review should be dismissed with costs on the following grounds:

(i) The applicant had not discharged the burden on the applicant to establish 'very exceptional circumstances'.

(ii) The applicant had failed to establish illegality, irrationality/ unreasonableness and legitimate expectation.

(iii) The questions and merits of this case is a substantial question of fact which needs to be determined before the SCIT and various cases have ruled.

(iv) This judicial review application is an abuse of the process of the court.

(v) The applicant/appellant must exhaust the domestic remedy, especially that they had filed Form Q.

Principles Of Judicial Review

[21] It is settled that an impugned decision is susceptible to judicial review on the grounds of illegality, irrationality, procedural impropriety and proportionality. In *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, the Federal Court (per Edgar Joseph Jr. FCJ) held:

> It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where **the impugned decision is flawed on the ground of procedural impropriety.**
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> But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

[22] In *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629, the Federal Court held:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that *the decision of inferior tribunal may be reviewed on the grounds of "illegality", "irrationality" and possibly "proportionality" which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter.* Thus, the distinction between review and appeal no longer holds. (emphasis added)

Evaluation And Findings

Illegality

[23] The taxpayer submits that the impugned assessments are tainted with illegality and amount to an error of law, as the impugned assessments are premised upon unlawful grounds ie, that the Revenue has (1) failed to take into account the taxpayer's right to exemption under para. 2 of the Income

Tax (Exemption) (No. 22) Order 2006 ("the Exemption Order"), and (2) unlawfully denied and deprived the taxpayer of its right to the exemption by invoking paras. 3 and 4 of the Exemption Order. The taxpayer referred to (1) *Society of La Salle Brothers v. Ketua Pengarah Hasil Dalam Negeri* [2017] 8 CLJ 298; [2018] 1 MLJ 376 (CA), (2) *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal* [2004] 2 CLJ 265; [2005] 3 MLJ 97 and (3) *Ketua Pengarah Hasil Dalam Negeri v. Alcatel Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563 and submitted as follows:

(i) It cannot be disputed that the expenditures are deductible under s. 33(1) of the Act.

(ii) The facilitation fund was not granted to fund or utilised to fund the expenditures, and the expenditures therefore plainly do not fall within the ambit of paras. 3 and 4 of the Exemption Order.

(a) The facilitation fund is to bridge the difference between the market value of the units and the PPA1M price (subsidised price) as shown by (1) Clause 6.4 of the funding agreement read together with Appendix 4 thereto; and (2) the Prime Minister's Office's letter dated 8 August 2017.

(b) A substantial part of the facilitation fund was only disbursed after the completion of the project, which would not have been the case if the facilitation fund was intended to be utilised and was indeed utilised to fund the expenditures which were incurred during the course of the project.

(c) Clause 2.1.2 of the funding agreement provides that it is a condition precedent to the funding agreement that the applicant submits documentary evidence to show, amongst others, that it has the capacity to finance the project. The taxpayer plainly would not be required to secure financing for the project if the facilitation fund was to fund or finance the project.

(d) The facilitation fund was to bridge the difference between the Gross Development Cost of the Project ("GDC") of RM447M (revised to RM339M) and the Gross Development Value of the Project ("GDV") of RM343M (revised to RM325.7M) as shown by (1) Clause 3 of the funding agreement, and (2) the second respondent's 11 April 2017 letter. Hence, the facilitation fund was applied to bridge the difference of RM13M between the GDC and GDV.

(iii) The affidavit evidence shows that the facilitation fund was to bridge the difference between the GDC and the GDV. There is no evidence or insufficient evidence to show that the facilitation fund was granted to fund or utilised to fund the expenditures. The Revenue failed to take into account these relevant facts and matters. Consequently, if at all, only expenditures made out of this RM13M may be disregarded under paras. 3(1) and 3(2) of the Exemption Order. Notwithstanding that, the Revenue have taken into account irrelevant matters as evident in their unsubstantiated stance that the entire facilitation fund of RM104.2M was used to fund the expenditures although there is not an iota of evidence showing that anything above the RM13M was used to fund the expenditures.

(iv) The Revenue had failed to take into account some relevant facts and matters as stated in para. 23(iii) hereinabove and had taken into account some irrelevant facts. Further, the taxpayer had acquired vested rights for tax exemption under the Exemption Order. In *Everise Sprint (M) Sdn Bhd v. Minister of Finance, Malaysia & Anor* [2015] 7 CLJ 309, the Court of Appeal held:

> [27] In para. 7 of his affidavit, the first respondent made it clear that he had considered all evidence brought before him and having considered them, he declined the application of the appellant. *Having found that the second respondent had failed to take into account some relevant facts and had taken into account some irrelevant facts we agreed with learned counsel that the decision of the respondent is one which is tainted with illegality as stated in R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 and *Ranjit Kaur Gopal Singh v. Hotel Excelsior.*

In *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748, the Court of Appeal states:

> [8] It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the *categories of such an error are not closed. But an error of law would be disclosed if the decision maker asks himself the wrong question, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or misapplies or misstate a principle of the general law.* (emphasis added)

[24] In *Society of La Salle Brothers v. Ketua Pengarah Hasil Dalam Negeri* [2017] 8 CLJ 298, the respondent confirmed in 1970 *via* a letter that the appellant, a charitable institution, enjoyed tax exemption and was not liable to income tax. In 2015, the appellant was served with notices for assessments for the years of assessment 2004, 2006, 2007, 2010, 2011, 2012 and 2013. The assessment raised were more than RM40 million. The Revenue contended that the appellant no longer enjoyed the exemption as it failed to

apply for exemption status pursuant to the amendments to the law. The Court of Appeal (per Tengku Maimun Tuan Mat JCA as Her Ladyship then was) held:

(1) **The 1970 letter made reference to the appellant's 'last letter'** and the respondent used the word 'confirmed', signifying that there would have been other earlier letters from the appellant and there would have been an earlier decision granting the exemption. The respondent had not seriously denied that **the appellant had enjoyed the tax exemption under the Ordinance. Therefore, the appellant's position that it had been granted tax exemption under the Ordinance was accepted.**

(2) While the Ordinance was repealed and replaced in whole by the Act, there is **no express provisions in the Act which indicate that the vested rights acquired under the Ordinance shall be revoked.** The HCJ failed to direct His Lordship's mind to s. 30 of the Interpretation Acts 1948 and 1967 ('the IA'). Even though the tax exemption granted under the Act would have ceased automatically pursuant to the amendments of the Act, those **amendments did not affect the appellant as it had not been granted the exemption under the Act but rather the Ordinance. The exemption remained valid and had not been revoked.** Pursuant to s. 30(1)(b) of the IA, the appellant continued to be entitled to the tax exemption.

(3) The HCJ erred in his ruling on the **burden of proof.** While the standard of proof may have changed due to the Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* ('*Sinnaiyah*') which held that at law there are only two standards of proof, namely beyond reasonable doubt for criminal cases and **balance of probabilities for civil cases,** *Sinnaiyah* did not alter the **burden which, in this appeal, remained on the respondent to prove.**

(4) The respondent had **no basis in law to issue the notices** and the **decision to issue those notices were illegal and without jurisdiction. Therefore, the decision of the respondent was amenable to judicial review.**

[25] In the present case, the respondents have failed to take into account some relevant considerations and have taken into account some irrelevant considerations as stated in para. 23 (i-iv) above. The respondents have also failed to consider or take into account the fact that the taxpayer had acquired vested rights for tax exemption under the Exemption Order. There is no evidence to show that the tax exemption acquired by the taxpayer has been expressly revoked. In the premises, this court finds that the respondents have committed an error of law and the impugned assessments is tainted with illegality and made without jurisdiction. Therefore, the decision of the respondents was amenable to judicial review. Further, the impugned assessments are (1) *ultra vires* the Exemption Order, (2) *ultra vires* s. 127(3)(b)

of the Act, (3) *ultra vires* art. 96 of the Federal Constitution, (4) made in excess of power and without jurisdiction, and (5) illegal and therefore, null and void.

Legitimate Expectation

[26] The taxpayer contends that the impugned assessments are in breach of the taxpayer's legitimate expectation and submitted as follows:

(i) The principle of legitimate expectation is well-established and deeply rooted in administrative law and tax law. See (1) *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, (2) *R (on the application of Aozora GMAC Investment Ltd) v. Revenue and Customs Commissioners* [2020] 1 All ER 803, (3) *R v. Inland Revenue Commisioners ex parte Unilever PK* [1996] STC 681 and (4) *Ketua Pengarah Hasil Dalam Negeri v. Latex Manufacturing Sdn Bhd* [2016] 9 CLJ 86; [2017] 7 MLJ 379.

(ii) The taxpayer had a legitimate expectation that (1) the facilitation fund was exempt from income tax; and (2) the deductibility of the expenditures was lawful and valid ("the taxpayer's legitimate expectation") based on (1) the second respondent's 11 April 2017 letter – which, pointedly, recognises that the facilitation fund is tax exempt (reinforced by the fact that the taxpayer's tax consultants had subsequently written to the second respondent on 19 April 2017 to confirm that paras. 3(1), 3(2) and 4 of the Exemption Order do not apply, to which the second respondent did not respond); and (2) the global settlement arising from the tax investigation which constituted a binding and concluded contract, and which led the taxpayer to reasonably believe that the deductibility of the expenditures was lawful and valid.

(iii) The taxpayer had, at all material times, acted and relied upon the taxpayer's legitimate expectation to the taxpayer's detriment as the taxpayer carried on the project and its business, including planning, budgeting and forecast based on the taxpayer's legitimate expectation that the expenditures were deductible. Therefore, the planning, budgeting and forecast of the taxpayer's business, was carried out without the expectation that the taxpayer would have to pay the impugned assessments totalling a substantial amount of RM14.7M. Furthermore, in reliance on the taxpayer's legitimate expectation, the taxpayer did not maintain a separate record for the use of the facilitation fund which the taxpayer would otherwise have, as provided for in para. 4 of the Exemption Order.

(iv) Consequently, by raising the impugned assessments, which constitute a retrospective deprivation of the taxpayer's acquired and vested right to the exemption, because of the Revenue' previous course of conduct referred to in para. 24(2) & (3) above, which created the taxpayer's legitimate expectation, the Revenue have acted in a manner that is unfair and is tantamount to a capricious abuse of power by the Revenue.

(v) Furthermore, the impugned assessments are illegal and unlawful as the impugned assessments not only amount to a retrospective deprivation of the taxpayer's acquired rights, but also punishes the taxpayer for non-compliance with para. 4 of the Exemption Order which in the taxpayer's legitimate expectation, was inapplicable to the taxpayer. See *Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121; [2006] 2 MLJ 498 and (2) *JK Cotton Spinning and Weaving Mills Ltd v. Union of India* AIR 1988 SC 191.

[27] In *Darahman Ibrahim &Ors. v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538, the Court of Appeal held:

> [50] **The principle of legitimate expectation** was first perceived by Lord Denning MR in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149, CA **to denote something less than a right which may nevertheless be protected by the principles of natural justice.** Put in another way, **a legitimate expectation amounts to an expectation of receiving some benefit or privilege to which the individual has no right.** It has been used by the courts on numerous occasions and in different contexts with the result that "there are many semantic confusions which have bedevilled this area of our law" (per Simon Brown LJ, in *R v. Devon County Council, ex p. Baker* [1995] 1 All ER 73, CA). In the words of Taylor J, in *R v. Secretary of State for the Home Department, ex p. Ruddock* [1987] 2 All ER 518, **"the doctrine of legitimate expectation in essence imposes a duty to act fairly."** The duty to act fairly applies in the context of legitimate procedural expectations as demonstrated by the case of *R v. Liverpool Corpn, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, CA. In *R v. Secretary of State for the Home Department, ex p. Ruddock* (*supra*), the substantive benefit was that individuals not falling within the government's published criteria for telephone tapping would not have their telephone calls intercepted by the security services.
>
> [51] I venture to say that *even where no promise of a benefit has been made and there is no established practice of granting that benefit, the person concerned is, elementarily, entitled to be treated fairly. Thus, stallholders in a market are entitled to be consulted before charges are increased* (*R. v. Birmingham C.C. ex p. Dredger* [1993] COD 340). But residents in an old people's home to whom no promise of consultation has been made need not be consulted before the local authority closes the home (*R. v. Devon County Council ex p. Baker* (*supra*) at p. 89 adopting the approach of *A.G. for New South Wales v. Quin* [1990] 93 ALR 1 at 39).

[28] In the present case, the purpose of granting the facilitation fund was to bridge the difference between the GDC and the GDV. The facilitation fund was not granted to fund or utilised to fund the expenditures. The second respondent's letter dated 11 April 2017 recognises that the facilitation fund is tax exempt. Furthermore, the taxpayer's tax consultants had subsequently written to the second respondent on 19 April 2017 to confirm that paras. 3(1), 3(2) and 4 of the Exemption Order do not apply; to which the second respondent did not respond. Therefore, the applicant/taxpayer has a legitimate expectation and is entitled to be treated fairly and be informed or given notice or a prompt reply to the taxpayer's tax consultants letter dated 19 April 2017 before the tax exemption or the deductibility of the expenditures is disallowed. To hold otherwise is tantamount to a breach of the principles of natural justice and in breach of the legitimate expectation of the taxpayer to be treated fairly.

[29] The second respondent has *vide* their letter dated 11 April 2017 clearly recognise that the facilitation fund is tax exempt and did not at all material times dispute the taxpayer's tax consultant's letter dated 19 April 2017 which confirmed that paras. 3(1), 3(2) and 4 of the Exemption Order do not apply. The taxpayer duly carried out and completed the works under the project on the understanding, expectation and belief that the facilitation fund is tax exempt and paras. 3(1), 3(2) and 4 of the Exemption Order do not apply. The respondents should not be allowed to contend that paras. 3(1), 3(2) and 4 of the Exemption Order do apply to the entire facilitation fund and to disallow the lawful deduction of the expenditures. This would be akin to retrospectively revoking or withdrawing the tax exemption for the facilitation fund. The respondents should not be allowed to approbate and reprobate as it is unconscionable and plainly unfair. See *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570 (CA), where the Court of Appeal states:

> A party should not be allowed to approbate and reprobate, it being unconscionable and plainly unfair.

[30] On the question of 'approbation and reprobation' it was held by the court in *Ee Kim Kin v. The Collector of Land Revenue, Alor Gajah* [1967] 1 LNS 41; [1967] 2 MLJ 89 & 91, that:

> … I do not think that the applicant should be allowed to blow hot and cold. He who had accepted compensation pursuant to an award is estopped from saying it was not an award. See judgment of Scrutton LJ in *Verschures Creameries Ltd Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608 611, which reads:
>
> > A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election – namely, that no party can accept and reject the same instrument

> ... The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[31] The above-mentioned doctrine of election could be applied in an application for judicial review. In the recent decision in *Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan* [2020] 10 CLJ 732 which involves an application for judicial review to quash the decision of the Labuan Financial Services Authority, the Federal Court stated that:

> [16] ... Such conscious conduct on the part of the appellant, viewed cumulatively must surely be held against it for it raises the application of the principle of law, in the words of Sir Nicholas Broune-Wilkinson VC in *Express Newspaper Plc v. News (UK) Ltd & Others* [1990] 3 All ER 376 "... that **it is not possible to approbate and reprobate.** That means you are **not allowed to blow hot and cold** in the attitude that you adopt. A man **cannot adopt two inconsistent attitudes towards another: he must elect between them** and, **having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.**"

Irrationality

[32] For the reasons in paras. 23-25 above, the taxpayer contends that the impugned assessments and the impugned penalties, are so egregious and oppressive that no reasonable person could have come to make the impugned assessments. See (1) *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, (2) *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and (3) *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1; [2021] 2 MLJ 822. The Revenue failed to take into account the considerations above as well as the fact that there is not an iota of evidence showing that anything more than RM13M of the facilitation fund of RM104.2M, was used to fund the expenditures. Yet, the Revenue has raised the impugned assessments on the unsubstantiated basis that the entirety of the RM104.2M was utilised to fund the expenditures.

[33] The taxpayer submits that the impugned penalties are so egregious and oppressive that no reasonable person could have come to make the impugned assessments. The impugned penalties are not a fair and just punishment in the circumstances of the case bearing in mind art. 8(1) of the Federal Constitution, as the taxpayer was not given a chance to show cause as to why the impugned penalties ought not to be imposed and the taxpayer's income tax returns were not made in bad faith or with intention of evading payment of tax. See *Tan Tek Seng* and *Rovin Joty* (above).

[34] The burden lies on the respondents to prove on a balance of probabilities that the entirety of the facilitation fund of RM104.2M was used to fund the expenditures. See *Society of La Salle Brothers* above. In the absence of cogent evidence to show that anything more than RM13M of the facilitation funds of RM104.2M was used to fund the expenditures, this court is inclined to agree with the taxpayer that the impugned assessments and the impugned penalties are so unreasonable, irrational that no reasonable person could have come to make the impugned assessments.

Purported Alternative Remedy

[35] The main contention of the Revenue is that the taxpayer has an alternative remedy to appeal to the Special Commissioners for Income Tax (SCIT) and the taxpayer must exhaust the domestic remedy when they have already filed the Form Q. The taxpayer submits that the taxpayer is entitled to bring this JR application notwithstanding the perceived availability of the alternative remedy, contrary to the Revenue's contention, as:

(i) There is no fit and proper alternative remedy in this case, since the reliefs sought in the JR application are not within the ambit of powers of the SCIT to grant.

(ii) In any event, this case falls squarely within the category of exceptional circumstances, and justifies the taxpayer bypassing the alternative remedy, as the impugned assessments were illegal and without jurisdiction, a breach of the taxpayer's legitimate expectation and/or irrational. The impugned assessments therefore are an excess of the Revenue' powers and constitute a serious breach of natural justice, which are exceptional circumstances warranting judicial intervention, as held by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* and *Society of La Salle Brothers* (above).

[36] As the Revenue had acted in excess of the Revenue's power and in breach of the rules of natural justice, this court finds that there are exceptional circumstances in this case that allows the statutory appeal procedure to be bypassed by way of a judicial review. See *Majlis Perbandaran Pulau Pinang* and Society of *La Salle Brothers* (above) and *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 where the Supreme Court held:

> [1] ***Certiorari*** is always at **the discretion of the Court.** But **where there is an appeal provision available** to the applicant, ***certiorari*** **should not issue unless there is a clear lack of jurisdiction or blatant failure to perform some statutory duty or serious breach of principles of natural justice.**

[37] Having carefully considered the statutory statement, affidavits and written submissions filed by the parties, this court finds that the respondents have committed an error of law and/or have misconstrued and/or misapplied paras. 3(1), 3(2) and 4 of the Exemption Order of the Income Tax Act 1967 as stated in the findings in para. 23 hereinabove. Further, having found that the respondents have failed to take into account some relevant facts and had taken into account some irrelevant facts, this court agrees with learned counsel for the applicant that the respondents have committed an error of law and the impugned decision of the respondents is tainted with illegality. See (1) *Everise Sprint (M) Sdn Bhd v. Minister of Finance, Malaysia & Anor* [2015] 7 CLJ 309 and (2) *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748.

Conclusion

[38] Based on the aforesaid reasons and subject to para. 39 below, the application for an order of *certiorari,* declaratory and other reliefs is allowed in terms of prayers (a)(i)-(iv) of encl. 1 with costs in the sum of RM15,000 (lump sum) to be paid by the respondents to the applicant.

[39] Pursuant to prayer (d) of encl. 1 for such further declarations, reliefs or orders that this court deems fit, proper and just; it is further ordered that the Revenue adjust the impugned assessments to (1) reflect only expenditures incurred out of the RM13M and (2) remove the impugned penalties.